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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of:

Review of the Pioneer's  
Preference Rules

ET Docket No. 93-266

To: The Commission

COMMENTS OF IN-FLIGHT PHONE CORPORATION

In-Flight Phone Corp., a licensee in the 800 MHz air-ground service, submits these Comments in order to present its views on options in the Commission's Notice for revising the agency's pioneer's preference rules.<sup>1/</sup> Under those rules, a party who develops an innovative communications service is guaranteed a license to provide that service rather than being required to compete for the license via auction, lottery, or comparative hearing.

Each proposal in the Notice for revising the pioneer's preference program is based on one of three premises. Proposals to define more clearly the type of innovation that will result in the grant of a preference<sup>2/</sup> and to simplify the processing of preference applications<sup>3/</sup> are based on a presumed need to streamline the pioneer's preference program in order to make it

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<sup>1/</sup> Notice of Proposed Rulemaking in ET Dkt. No. 93-266 (FCC 93-477, rel. Oct. 21, 1993).

<sup>2/</sup> Notice at ¶ 17.

<sup>3/</sup> Id. at ¶¶ 14-16.

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more efficient. Proposals to eliminate the preference program<sup>4/</sup> or to make preferences less valuable by requiring recipients to pay for licenses awarded via preferences<sup>5/</sup> are based on the assumption that awarding licenses by auction (which may begin next year) will accomplish the same objective that the pioneer's preference program was designed to achieve. Finally, the proposal to exempt those whose preference applications already have been granted from rules adopted in this proceeding is based on the assumption that it would be inequitable to apply new preference rules to such applications.<sup>6/</sup>

#### DISCUSSION

In-Flight supports the Commission's proposals to streamline the pioneer's preference rules in order to define more clearly the types of innovation that will result in the grant of a preference and to simplify the processing of preference applications. These revisions would help eliminate frivolous preference applications and would reduce the burden on the agency to administer the preference program.

While In-Flight supports Commission proposals to streamline the pioneer's preference program, it opposes the remaining proposals described in the Notice because, as shown below, they are based on demonstrably erroneous assumptions.

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<sup>4/</sup> Id. at ¶ 11.

<sup>5/</sup> Id. at ¶ 12.

<sup>6/</sup> Id. at ¶ 18.

First, the Commission cannot rationally terminate the pioneer's preference program or reduce the value of preferences to their recipients based on the premise that auctions will accomplish the preference program's objective because licenses for numerous types of communications service cannot lawfully be awarded by auction. By its express terms, Section 309(j) of the Communications Act empowers the FCC to issue licenses by auction only for communications services in which "the principal use of . . . the spectrum . . . is reasonably likely to involve . . . the licensee receiving compensation from subscribers. . . ." Licenses to provide services for which the principal spectrum use is not reasonably likely to involve such subscriber compensation cannot lawfully be awarded by auction. The House Report accompanying Section 309(j) noted that the statute contains only a "limited grant of authority" and was not intended to permit the award of licenses "for virtually all private [radio] services, including frequencies utilized by Public Safety Services, the Broadcast Auxiliary Service, and for subcarriers and other services where the signal is indivisible from the main channel signal."<sup>7/</sup> The Report noted that broadcast services are likewise exempt "inasmuch as . . . [they] are provided to the general public without the payment of a subscription fee. . . ."<sup>8/</sup> The House Conference Committee

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<sup>7/</sup> House Report (Budget Comm.), H. Rep. No. 111, 103d Cong., 1st Sess. at 253 (1993), reprinted in Sept. 1993 U.S.C.C.A.N. 378, 580.

<sup>8/</sup> Id.

Report noted that auctions similarly are barred in the award of ITFS licenses.<sup>9/</sup>

Second, even if auctions could be used lawfully to award licenses in all communications services, there still is no basis for the FCC's speculation that auctions will accomplish the preference program's objective of ensuring that innovators obtain licenses. In fact, the Commission's speculation that they will do so is irrational. By their nature, auctions are a device to capture the monetary value that the market places on an auctioned commodity rather than a device to reward the party who developed that commodity. Once the FCC establishes regulations to govern a new communications service because of the technological innovation of an innovator, the spectrum allocated to that new service becomes a commodity, and the winning bid in an auction to use that spectrum can be expected from the person who places the highest economic value on the spectrum. The marketplace has no reason to reward the innovator by ensuring that he is able to submit the winning bid for the new commodity that his innovation created. The only conceivable exception to this proposition would be a situation where the FCC's rules establishing the new service required that

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<sup>9/</sup> House Conf. Report, H. Conf. Rep. No. 213, 103d Cong., 1st Sess. at 481 (1993), reprinted in Sept. 1993 U.S.C.C.A.N. 1088, 1170. In-Flight's pending application for pioneer's preference is a perfect illustration of a communications service to which the agency's auction authority is inapplicable. See Applic. for Pioneer's Pref. (ET Dkt. No. 92-100, filed Oct. 30, 1992). In that application, In-Flight seeks a preference for developing a multi-channel audio programming service for airline passengers. The vast majority of revenue to support the service will come from advertising messages within programming rather than from subscribers.

anyone desiring to provide the service must use the innovator's technology. Although it is inconceivable that the FCC ever would adopt rules requiring all licensees to use the innovator's technology, if it did the spectrum would not be a simple commodity, and the marketplace would help ensure that the innovator wins the auction because the innovator could control his competition in the bidding process by deciding the terms and conditions under which he would license others to use his technology.<sup>10/</sup>

This essential point -- that auction winners are those who believe the auctioned commodity is most valuable rather than the innovators who are responsible for creating that value -- can be illustrated by examining the two cases in which the Commission has awarded pioneer's preferences. In those cases, VITA and Mtel had developed technological innovations that helped convince the Commission to create the NVNG mobile satellite and narrowband PCS services, respectively; as a result of their innovation, each will

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<sup>10/</sup> While it is theoretically possible that the marketplace also might help an innovator put together a winning bid where the FCC's rules governing use of the subject spectrum somehow made it easier or cheaper to provide service using the innovator's technology, no one would devote the substantial resources necessary to develop an innovative new service based on such theoretical musing. In the first place, the FCC invariably goes out of its way to avoid adopting rules to govern a new service that prefer the use of one technology over another. And it is highly unlikely that the marketplace would appreciate that the innovator's technology is superior to other technologies in advance of the auction in any event. In-Flight's founder has personal knowledge about the slow pace at which the marketplace recognizes innovation. Thirty years ago, In-Flight Chairman Jack Goeken founded MCI, but the marketplace did not recognize this as a truly innovative idea until substantially more than a decade later. The founders of Federal Express, Microsoft, Dell Computers, and nearly every other highly innovative business would have a similar story.

receive a license under the pioneer's preference program. If all licenses in the NVNG mobile satellite and narrowband PCS services were awarded by auction, the high bidders plainly would be those who attach the most value to the spectrum allocated for these uses rather than those, like VITA and Mtel, who created that value since the FCC's rules governing these two services were intentionally designed to permit a broad array of technologies to be used to provide these services.

Finally, the Commission's proposal either to eliminate or substantially reduce the value of the preference program for those whose preference applications were pending on October 21, 1993 when the Notice was issued is likewise irrational in light of its decision to leave the program in place for those whose applications had been granted prior to that date. The Commission properly notes in the Notice that it would be unfair "as a matter of equity" to eliminate the preference program or to reduce the value of preferences for those whose applications had been granted prior to October 21.<sup>11/</sup> But it makes no effort to explain why it would be less inequitable to change the program for those whose applications were pending on October 21 simply because the Commission had not yet processed them. In both situations, preference applicants risked time and money to develop innovative proposals in reliance on preference rules that had been designed specifically to encourage such risk-taking. Under these circumstances, it would be unfair to pull the rug out from under those whose applications were

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<sup>11/</sup> Notice at ¶ 18.

pending on October 21 while simultaneously acknowledging the unfairness of pulling the rug out from under those whose applications had been fully processed by that date.

CONCLUSION

The Commission may appropriately streamline its pioneer's preference rules to define more clearly those whose innovations are entitled to a preference and to change the manner in which such applications are processed. But it would be irrational and unfair for the agency, on grounds put forward in the Notice, to eliminate the preference program or to reduce the value of preferences for those whose pending applications relied on the existing preference rules.

Respectfully submitted,

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